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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JOHN OLSON, Defendant and Appellant.	A099183 (San Mateo County Super. Ct. No. CV396986)

John Olson appeals from a final judgment and order of commitment pursuant to Welfare and Institutions Code section 6604,[1] entered upon a jury verdict finding true the allegation in respondent's commitment petition that he was a sexually violent predator (SVP). Appellant contends that: (a) the trial court committed prejudicial error by permitting the victim of one of appellant's predicate offenses to testify over defense objection; (b) the trial court erred prejudicially by failing to give the jury a pinpoint instruction on the meaning of "likely" to engage in sexually violent criminal behavior; and (c) there was insufficient evidence to support the jury's verdict. We disagree with appellant's contentions, and therefore affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant was born in August 1942. In April 2002, at the time of the jury trial on the commitment petition in this case, he was 59 years old.

[1] Unless otherwise indicated, all further unspecified statutory references are to the Welfare and Institutions Code.

UNDERLYING OFFENSE

At the time of trial, Cristina was 27-years old, married with children, and employed as a secretary. She testified that appellant began molesting her in 1982, when she was about 8 years old. At that time, Cristina was living primarily with her grandparents and making visits to her divorced mother, who was dating appellant. On occasion, Cristina's mother would leave Cristina with appellant for him to baby-sit. At first, appellant was just "real friendly" and "real nice" to Cristina, and would tell her she was "pretty." Appellant began to molest Cristina approximately a month after meeting her. On the first such occasion, appellant sent Cristina' s brother and her cousin outside to play, and then asked Cristina to sit with him on the couch while they watched television. When she did so, he started touching Cristina's breasts over her clothing. This pattern of molestation continued thereafter. Over time, appellant progressed to touching Cristina's breasts under her clothing. Eventually, every weekend when Cristina was visiting her mother, appellant would come into Cristina's room at night and touch her breasts and genitals "skin to skin," under her nightclothes. Appellant gave Cristina gifts, including flowers and recordings that she wanted. As time went by, and appellant's touching of Cristina became increasingly invasive, he would regularly penetrate her with his fingers.

Cristina testified to several occasions on which appellant raped her. The first time, Cristina went into her mother's room to sleep with her mother and appellant because she was scared by something she heard in the backyard. After her mother left early the next morning, appellant remained in bed with Cristina and began touching her. He had her sit on his lap, and penetrated her vagina with his penis. Cristina was in pain and was "really scared," but afraid "to tell him no." When she got up, she had blood on herself. On another occasion, appellant penetrated Cristina on the couch in the living room. When Cristina started to cry, appellant "got mad" or "annoyed," and told her "to be quiet" because her mother was at home asleep at the time. A third such incident occurred in Cristina's mother's bedroom, when appellant again had Cristina sit on his lap.

Once, while Cristina was on a Parents Without Partners camping trip with appellant and her mother, appellant was giving children rides on his motorcycle. Cristina was the last child he took on a ride. Appellant took Cristina down "a side road," ending up in some bushes where he had Cristina get off the motorcycle because he "wanted to show [her] something." Appellant took Cristina into a wooded area and told her to lie down. Cristina told appellant she did not want to, but he ignored her. Appellant took off Cristina's panties and orally copulated her. He told her that if she told anybody, he would hurt her brother, her cousin and her mother. Cristina believed appellant's threats, and kept secret what he had done to her.

Once the molestation began, appellant molested Cristina every time she stayed at her mother's house. The molestations did not stop until the relationship between appellant and Cristina's mother ended. Cristina eventually told her fourth grade school teacher about the molestations after a school discussion on inappropriate touching. After the teacher notified the school principal, the latter called Cristina's grandmother and the police. Nothing came of the investigation after Cristina's mother refused to believe the allegations. Even after this, appellant continued to stalk Cristina. At least once he picked her and a friend up after church school and then began touching her as she sat in the passenger seat of his car. Appellant continued to threaten that if Cristina were to tell, he would hurt her family. Finally, at the suggestion of a therapist, Cristina asked her friends if anything similar had happened to them. One of Cristina's neighborhood friends, victim A., revealed that appellant had also molested her. Thereafter, Cristina's mother finally believed her daughter's story, and the investigation recommenced. Appellant was arrested on May 21, 1987.

UNDERLYING PROSECUTION AND SUBSEQUENT PETITION FOR SVP COMMITMENT

On June 12, 1987, the District Attorney of San Mateo County filed a 29-count information charging appellant with molesting three female minor victims between September 1982 and June 1986: Cristina, A., and a third victim named S.[2] The three

[2] At trial, the victim identified herself as Cristina, a name that does not appear in the information. According to prosecution expert psychologist Dr. Kathleen Longwell,

victims were all between the ages of 6 and 9 years at the time of the charged incidents. The information included 24 felony counts of lewd or lascivious acts committed upon a child under the age of 14 (Pen. Code, § 288, subd. (a)), with a special allegation applicable to counts 6 through 24 for substantial sexual conduct with a victim under the age of 14 (Pen. Code, § 1203.066, subd. (a)(8)), and five counts of wilfully and unlawfully annoying and molesting a child under the age of 18 (former Pen. Code, § 647a, renumbered § 647.6 and amended Stats. 1987, ch. 1418, § 4.3).[3]

Appellant ultimately entered a no contest plea shortly after Cristina testified at the preliminary hearing. In January 1988, he was sentenced to 14 years in state prison and committed to the Department of Corrections under a negotiated settlement pursuant to which appellant pled nolo contendere to five of the felony counts of lewd or lascivious acts committed upon a child under the age of 14 in return for dismissal of the other charged counts. Although appellant admitted molesting Cristina, including having her sit on his lap while both had their pants down, he denied inserting his finger or his penis into her vagina or having sexual intercourse with her. Appellant admitted touching victim A.'s private parts, but claimed that he had asked her if could do so, and she had said that it was all right. Appellant denied the charges involving victim S., which concerned his allegedly making lewd comments to her, asking her sexual questions, and suggesting that he have sexual relations with her. Appellant claimed S. and his stepson were talking about sex and asked him questions, which he answered. He claimed he found S. and his

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Cristina was the name by which the victim preferred to be called, and the names by which she was identified in the information were her actual first and last names.

[3] Counts 1 through 23 related to appellant's molestation of Cristina, based on alleged incidents occurring between September 1, 1982, and May 31, 1983, between October 1, 1983, and May 31, 1984, and between November 1, 1984, and May 31, 1985. Count 24 charged appellant with lewd and lascivious acts upon victim A. under Penal Code section 288, subdivision (a), committed "on and between January 1, 1983 through June 30, 1983." Counts 25 through 29 all related to victim S.; each alleged that appellant "did wilfully and unlawfully annoy and molest" victim S. "on and between September 1, 1985 through June 30, 1986."

stepson watching an x-rated film, which he had them turn off. In addition, appellant claimed the 9-year-old S. had told his stepson that she had had sex, and that she had started having sex with other people at the age of six.

Appellant was paroled in January, 1995. Upon his release he was sent to Oregon, at his own request. As part of the conditions of his parole, appellant participated in an outpatient sex offender treatment program in Oregon with a Dr. Knapp. According to the records of appellant's participation in this program, appellant told Dr. Knapp that there had been approximately 20 child victims of his molestations in the course of his life. According to appellant's Oregon parole officer, appellant had admitted molesting his daughter from his second marriage when she was approximately 8 years old.

One of the conditions of his parole was that he have no contact with minors. In August 1995, appellant was found to have violated his parole on this ground, based on two incidents. Once after attending an Alcoholics Anonymous (AA) meeting, he gave a ride home to a 16-year old girl. In addition, upon his release on parole, appellant had contact with his 16-year-old stepdaughter when his wife picked him up in her car. Appellant's parole was revoked, and he was recommitted. In 1996, the Board of Prison Terms started an evaluation of appellant as a sexually violent predator.

On June 21, 1996, the San Mateo County District Attorney filed a petition for judicial commitment pursuant to section 6250 et seq., asking the court to determine that there was probable cause to believe appellant was an SVP, as that term is defined in section 6600, et seq., and was "likely to engage in sexually violent predatory criminal behavior upon his release from custody." On November 20, 1996, following a hearing, the trial court found probable cause, and set the matter for jury trial. On August 18, 1997, appellant was ordered transferred to Atascadero State Hospital (Atascadero), where he remained awaiting trial. Thereafter, trial was continued numerous times, in part to permit additional doctors to interview, examine, diagnose and evaluate appellant.

In June 2000, following a hearing, the court again found probable cause to conclude appellant was an SVP under section 6600. The matter was set for jury trial.

Following several additional continuances in part occasioned by the need to secure expert witnesses, jury trial commenced in April 2002. On April 3, 2002, appellant moved pursuant to Evidence Code section 352 to exclude testimony by appellant's victims about appellant's prior sexual conduct, on the grounds it was more prejudicial than probative, and would involve an undue consumption of time. The trial court denied the motion. When the parties commenced presentation of evidence to the jury on April 8, 2002, the prosecution called Cristina as its first witness.

PROSECUTION EXPERT TESTIMONY

The other witnesses called by the prosecution were three experts, all psychologists: Drs. Kathleen Longwell, Dennis R. Sheppard, and Douglas R. Korpi. Since 1996, Dr. Longwell had been a member of the California Department of Mental Health (the Department) panel that evaluates individuals for SVP status under section 6600, and she had also trained other doctors for work on that panel. Dr. Longwell herself had conducted approximately 200 evaluations of individuals eligible for parole to determine whether they qualified for SVP status and should be referred as such to a local district attorney to initiate SVP proceedings. Of these, she had found approximately 60 percent qualified for SVP status.[4]

Dr. Longwell was appointed to evaluate appellant as a potential SVP in November 1998. In accordance with standard practice, she reviewed all of appellant's medical, psychological, judicial and prison records. She also met briefly with appellant twice, but

[4] As Dr. Longwell explained, the Board of Prison Terms first screens the prison population for individuals about to be paroled who have been convicted of qualifying sex offenses against at least two victims. The Department then screens these individuals for those who appear likely to qualify for SVP status. Those who appear to qualify are in turn evaluated independently by two members of the panel of psychologist evaluators. An individual found by the evaluators as qualifying for SVP status receives a final review by the Department before being referred to the office of the district attorney in the county where the person committed his or her last sex offense. The district attorney in turn decides whether to file a petition for judicial commitment. Individuals found not to meet the qualifications for SVP status are paroled. Only approximately 10 percent of sex offenders up for parole who go through this process actually end up going to trial on SVP petitions.

he did not consent to be interviewed by her. Appellant told her he felt previous evaluators had been unfair to him, and he did not trust anyone from the Department to do a fair evaluation of him. Dr. Longwell conducted another evaluation of appellant in June 2001 to update her earlier assessment. Once again, appellant rejected her attempts to interview him beyond a brief meeting.

Dr. Longwell described the three criteria a Department evaluator must identify in determining whether an individual qualifies for SVP status. First, the person must have been convicted of two sexually violent offenses against two or more separate victims. Second, the person must have a diagnosed mental disorder that predisposes him or her to the commission of future sex crimes. And third, the individual must be *likely* to commit another sexually violent offense based on his or her diagnosed mental disorder if he or she does not receive appropriate treatment in custody.[5]

According to Dr. Longwell, appellant met all three tests. First, appellant's records proved that he had been convicted of at least two qualifying lewd and lascivious offenses (Pen. Code, § 288, subd. (a)), committed upon two separate victims. Specifically, he had pleaded no contest and been convicted of four counts against Cristina and one count against A., as well as one misdemeanor count against S. The offenses of which appellant had been convicted qualified as sexual and violent because they involved substantial sexual conduct with children under 14.[6] Aside from these convictions, an arrest at the

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5 These criteria correspond with the provisions of section 6600, which provides in pertinent part as follows: "(a)(1) 'Sexually violent predator' means a person who has been convicted of a sexually violent offense against two or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior. [¶] . . . [¶]

"(c) 'Diagnosed mental disorder' includes a congenital or acquired condition affecting the emotional or volitional capacity that predisposes the person to the commission of criminal sexual acts in a degree constituting the person a menace to the health and safety of others."

6 Dr. Longwell defined "substantial sexual conduct" as including masturbation of either the perpetrator or the victim; penetration of the vagina or anus by the perpetrator's finger, penis, or other object; or oral copulation of the victim by the perpetrator or the reverse.

age of 19 for "joy riding" and a possible arrest for driving under the influence, appellant had no other substantial criminal history.

Second, Dr. Longwell diagnosed appellant as suffering from pedophilia, defined as a mental disorder characterized by sexual urges, fantasies, or behaviors toward pre-pubescent children over a period of at least six months, and causing significant clinical distress or negative impact on their life functioning. Appellant had a "very difficult childhood," having been raised by a "very abusive" grandmother and sent away to a boarding school "where there was more abuse." He had developed a drinking problem in his teen years. However, he became very active in AA in 1981, and his alcoholism was currently in remission. Appellant himself had sought treatment for depression in 1981 with a Dr. Lasker. He reentered therapy in February 1985, after he learned that Cristina had told her mother about the molestations. At that time, appellant told Dr. Lasker that he had molested Cristina; that he had a problem with sexual interest in children; and that when he had sex with adult women or masturbated, he fantasized about children.

Dr. Longwell based her diagnosis of pedophilia on appellant's history showing that his sexual preference for children was "quite fixed, it was over a long period of time, and he had significant difficulty controlling those urges." Appellant himself told Dr. Longwell "I'll always be a pedophile, I'll always have urges, but I can control them now." According to notes in his record, appellant had told a social worker that he was a "groomer" rather than a "snatcher"; i.e., rather than grabbing or kidnapping children for sex, he would spend time getting to know a child first to gain the child's confidence and set up a situation where he could molest the child without detection. Elsewhere in appellant's record it was reported that he had told a psychiatric nurse that he had impulse problems, often could not control himself, and did not think about what he was doing before he did it. Appellant had told a therapist identified as a Dr. Fowler at Atascadero that he had had the problem of pedophilia since he was five years old.

Dr. Longwell testified that although appellant had participated in treatment programs having to do with substance abuse and was very active in AA, he had not

participated in any treatment for his pedophilia while in prison or at Atascadero. Appellant explained his failure to obtain such treatment by stating that he had received adequate treatment from Dr. Knapp while he was in Oregon on parole, through which he had gained sufficient ability to control his impulses to avoid a relapse. He strongly felt that his parole had been unfairly revoked, and he should have been permitted to continue his treatment in Oregon. He decided not to participate in treatment programs thereafter because he was concerned that anything he said could be used against him in the proceedings to commit him as an SVP. Appellant indicated that he would only participate in sex offender treatment if he was adjudicated an SVP and committed on that basis.

Dr. Longwell testified that appellant had some traits associated with antisocial personality disorder. He had been deceitful in his dealings with the mothers of the victims as well as the victims themselves, and had not exhibited any significant amount of empathy, remorse or guilt for the harm he had caused others. He tended to blame his victims or accuse them of lying about what he had done. Specifically, appellant would claim his victims had sexual contact with him willingly, or that they even initiated it themselves; and he denied ever using force or threats to get the victims to have sexual contact with him.

On the third and critical question, Dr. Longwell concluded that unless appellant completed a comprehensive sex offender treatment program and remained on monitoring, he was likely to commit another sex offense upon his release. In evaluating this question, Dr. Longwell began by conducting two psychological statistical tests, analyses, "instrument[s]," or "rating scales" designed to rate the risk of a known sex offender being convicted of another such sex offense. These statistical tests were identified as the RRASOR and the STATIC-99. After scoring appellant using those two tests, Dr. Longwell then took into account other factors from appellant's life history which had the effect of aggravating or mitigating the risk of his reoffense. She based her ultimate

evaluation of the likelihood of appellant's committing another sex offense on a combination of the statistical results and the more general historical factors.

The first statistical instrument, the RRASOR, analyzed four variables: (a) the number of charges and convictions prior to the current charges; (b) whether there were any male victims; (c) whether the perpetrator was under the age of 25 at the time of the evaluation; and (d) whether the perpetrator had any unrelated victims. Of these four, the only variable on which appellant scored positively was the last, since at least one of his victims was not related to himself. Because appellant had no sex offenses prior to the current or "index" offense, no male victims, and was over the age of 25, he scored only a 1 on the test. This result translated to a very low statistical probability of reconviction, or a 11.2 percent chance of being convicted of another sex offense within 10 years.

Dr. Longwell testified that a Canadian researcher, Dr. Karl Hanson, developed the RRASOR scale by comparing histories of sex offenders who committed new sex offenses upon release with those who did not, and attempting to isolate the variables distinguishing the two groups. According to Dr. Longwell, Dr. Hanson had cautioned that the RRASOR was meant to be "used as a guide but not as a final determination" and that decisions about whether an individual would be paroled should not be based solely on his or her RRASOR score, because its degree of accuracy for predicting sex offense reconvictions was "limited," and "just not high enough that you would want to make a decision only on that information." Among other things, Dr. Longwell noted that "a good portion of people who would reoffend are not caught within [the RRASOR] sample," while some individuals who would *not* reoffend *were* in that sample. Moreover, she testified that the most conservative estimate of the ratio of child molest victims to molesters convicted was approximately two and one-half to one.

The second statistical test utilized by Dr. Longwell was the STATIC-99, a somewhat more sophisticated analytical instrument developed by an English psychologist, Dr. David Thornton, in collaboration with Dr. Hanson, through combining the original four RRASOR actuarial variables with six additional ones. In addition to the

original RRASOR factors, the STATIC-99 analyzed: (a) whether the individual had ever lived with a romantic partner in a committed relationship for two or more consecutive years; (b) whether the individual had four or more convictions for serious crimes prior to their last sex offense; (c) whether the person's last sex offense conviction included an additional conviction related to some act of violence; (d) whether the individual had any prior convictions for violent behavior of a nonsexual nature; and (e) whether the individual had any victims who were strangers, i.e., known to the individual for less than 24 hours. As in the case of the RRASOR test, appellant once again scored only 1 on the STATIC-99, since the additional factors in that test did not apply to him. Appellant's STATIC-99 score correlated with a very low risk of being convicted of another serious sexual offense, no higher than 7 percent in 10 to 15 years.

As in the case of RRASOR, Dr. Longwell testified that the STATIC-99 was of limited predictive value because it only estimated the likelihood of conviction, not of commission of or arrest for a new sex offense, and it failed to include various risk factors that could apply to a specific individual like appellant. Among other things, Dr. Longwell noted that the STATIC-99 was heavily weighted towards identifying psychopathy, so that career criminals with a history of violence were likely to score high, whether or not such individuals were otherwise likely to reoffend. By the same token, the test would tend to under identify "what we might call classic pedophiles, who do not have a lot of psychopathy, who have worked in their life, paid taxes, not committed a variety of crimes but who are quite entrenched pedophiles." Dr. Longwell specifically cited such "entrenched," "groomer" pedophiles, who may have lived otherwise productive and socially appropriate lives at the same time that they had many victims over a long period of time, but no arrests or convictions. Both the STATIC-99 and the RRASOR would typically give such individuals very low scores, particularly if they had avoided detection for a long time, and even if they were in fact very likely to repeat their offense. Appellant's own lack of earlier convictions or reported molestations had

significantly lowered his score on both the RRASOR and STATIC-99 tests, even though he had 29 counts in the indictment in this particular case.

Because of the practical limitations of these two tests, Dr. Longwell considered a number of "other actuarial risk factors" and "variables" not included in either of the standard statistical tests, in order to supplement her analysis of the issue of appellant's likelihood to commit another molestation. Dr. Longwell identified more risk factors establishing an increased risk of appellant reoffending than the reverse.

The factors indicating a greater risk of reoffense included appellant's history and well-established diagnosis as a pedophile with a sexual preference for prepubescent children; the early onset of his sexual offenses, beginning before his own adolescence;[7] his failure to complete any sexual offender treatment programs; his separation from his parents before the age of 16; his experiences of abuse in childhood and negative relationship with his mother; his failure to be free of sexual misconduct for a period of five or more years since his last sex offense; his failure to comply with the conditions of his parole barring contact with minors; his five marriages, most of short duration, manifesting a difficulty maintaining intimate relationships with adults; his molestation, in at least two cases, of his wives' children; his pattern of blaming his victims or refusing to take full responsibility for his sex offenses, manifesting a lack of remorse; his claims that his six-to-eight-year-old victims were willing or consensual participants, demonstrating his failure to understand either the harm he had done, or that children cannot consent to sex; and his habitual tendency to put himself in high risk situations, such as by targeting vulnerable single mothers with children the age that appealed to him. Dr. Longwell testified that all of these risk factors significantly increased the likelihood that appellant would commit sex offenses upon his release.

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[7] The record shows appellant had admitted to molesting "at least" 20 victims before the three named in the underlying criminal action. More significantly, appellant had informed psychologists interviewing him that he could remember molesting younger girls, even to the point of intercourse, before he was 15 years old, and "experimenting" with them when he himself was only 9 years of age or even younger.

Dr. Longwell also identified variables which lessened or mitigated appellant's risk of reoffending. These included appellant's participation in some sex offender treatment while not incarcerated; the fact appellant appeared to have gained some knowledge of and insight into the nature of his own mental disorder, recognition of the factors that could lead him to reoffend, and understanding of what was necessary to avoid doing so; his "really excellent" behavior both in prison and at Atascadero; his active participation in AA and alcohol dependency treatment programs; his avoidance of impulsive or antisocial behavior in prison or the hospital; and his age.

However, Dr. Longwell testified that it was "difficult to assess how much he has really integrated these" positive developments, knowledge, understanding and better behavior in his life. Moreover, the fact appellant had reoffended when he was over 40 years old, had violated the conditions of his parole when he was over 50, and had such a long history of pedophilia and molestation of children dating to his own preadolescence, all indicated that he could be the type of pedophile who would continue to be a risk despite his advancing age. Considering and weighing all these aggravating and mitigating factors together, Dr. Longwell concluded that "unless [appellant] really completes a comprehensive sex offender treatment program and . . . remains on monitoring, . . . he is likely to commit another sex offense once he's released and is no longer under any kind of supervision or hold." Based on the "groomer" style of his molestations, she further opined that the offense he was likely to commit would be predatory in nature.

The prosecution's two other expert witnesses gave testimony concurring with that of Dr. Longwell. Like Dr. Longwell, psychologist Dr. Douglas Korpi served as a member of the SVP evaluations panel and a consultant to others on that panel, and had performed approximately 200 evaluations of individuals approaching parole, of whom he had determined approximately half met the qualifying definition for SVP status. Based on appellant's records, his own and others' previous evaluations of appellant and his one interview with him, Dr. Korpi concluded that appellant qualified under all three of the

criteria for SVP status: conviction of two qualifying sex offenses against two separate victims, a diagnosed mental disorder disposing him to commit future sex offenses, and a likelihood of committing another sexually violent offense if he did not receive appropriate treatment in custody.

Like Dr. Longwell, Dr. Korpi also found appellant's low score on the STATIC-99 test had to be adjusted by a consideration of supplemental individualized factors. To Dr. Korpi, the statistical test was simply a threshold screening tool that could not serve as the ultimate determiner of whether an individual was an SVP. He noted that the fact appellant was a diagnosed pedophile was not counted in the STATIC-99 test analysis, although it was a crucial element in determining the likelihood of his committing another offense after release. Dr. Korpi agreed that the additional factors cited by Dr. Longwell weighed in favor of finding appellant an SVP. Specifically, Dr. Korpi was disturbed by appellant's statements to his parole officer that he had inappropriately touched the daughter of his fifth wife on her breasts sometime between 1986 and 1988, well after his arrest and earlier treatment in connection with his molestations of Cristina, A. and S.; and by appellant's failure to comply with the condition of his parole that he not be in contact with minors under 18. This evidence caused Dr. Korpi to seriously question appellant's judgment and his ability to avoid committing a sexual offense in the future.

Dr. Korpi acknowledged on cross-examination that Dr. Hanson, the creator of the RRASOR test and codeveloper of the STATIC-99 test, believed the test results should not be adjusted by more than 10 percent in consideration of additional individuating factors. However, Dr. Korpi pointed out that Dr. Thornton, Dr. Hanson's codeveloper of the STATIC-99, had stated that individualized factors should be used, and could adjust the test result by as much as 90 percent. With regard to the effect of appellant's age on his likelihood of reoffense, Dr. Korpi testified that appellant's form of mental disorder and pattern of pedophilia placed him in the only group of sex offenders who continue to commit sexual offenses past 60 years of age. Extrafamilial child molesters of the

grooming type are the only group of sex offenders who continue to reoffend after the age of 60 in any significant number.[8]

Psychologist Dennis Sheppard, the prosecution's third expert witness, gave similar testimony. Dr. Sheppard had done approximately 60 SVP evaluations, in which he had found approximately 54 percent of the individuals to qualify for SVP status. Like the other two prosecution experts, Dr. Sheppard found the appellant qualified as an SVP who was likely to reoffend. Dr. Sheppard testified that appellant's low STATIC-99 test score was outweighed by his failure to have completed any treatment program specifically oriented to sex offenders; his failure to participate in any meaningful treatment for sex offenders while at Atascadero; his admitted molestation of his stepdaughter by his fifth wife sometime after 1986, after his arrest on the underlying charges in this case; his long history of molestation from around the time of his own adolescence; and, despite his age, his admitted continuing pedophilic urges for prepubescent girls after four decades. In sum, Dr. Sheppard concluded that appellant was an untreated sex offender, who was likely to recommit sex offenses upon his release.

DEFENSE TESTIMONY

In his defense, appellant presented the opinion testimony of three expert witnesses, all of whom testified that even if he met the first two criteria for being an SVP, appellant should not be adjudicated as such because he was *not likely* to reoffend.

Psychologist Dr. Theodore Donaldson testified that he worked as an expert witness for the defense in SVP cases. He had evaluated approximately 200 persons in SVP cases, of whom he had concluded that only 15 (7.5 percent) were likely to reoffend. Appellant agreed to be interviewed by Dr. Donaldson. Alone of all the other experts who

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[8] Dr. Korpi testified: "This wasn't an easy case where I could make a snap judgment. I had to really go carefully through the facts of his life to see how it all added up. [¶] And with his age, that is a huge—that's—people slow down. A rapist, for example, after 60, [the likelihood of reoffense is] almost nonexistent. The only people that continue after 60 are extra-familial child molesters in any great number. [Appellant] happens to be [in] that one group that keeps going, keeps on ticking."

testified at trial, Dr. Donaldson testified that appellant did not have a diagnosable mental disorder, and was not a pedophile.

Dr. Donaldson based his diagnosis on his conclusion that appellant was not compelled to behave in any particular way, and specifically did not commit his molestations against his own will. Because he found that appellant did not suffer from any condition that seriously impaired his ability to control his own behavior, Dr. Donaldson concluded that appellant was not likely to commit another sexual offense. Indeed, Dr. Donaldson did not agree that appellant was actively molesting children in his 40's, because his molestations of Cristina and A. occurred when he was just 40 or 41. Dr. Donaldson credited appellant's version of the facts, opining that appellant did not groom any new victims after 1983; appellant stopped his molestations whenever his victims resisted; and appellant had not had any pedophilic fantasies since 1993.[9] With regard to the analyses of the prosecution's experts, Dr. Donaldson opined not only that the actuarial, statistical tests were "not very accurate," but that any clinical assessments based on observed facts had "almost no value, [only] slightly better than chance." In sum, Dr. Donaldson believed there was no way to be confident of *any* prediction of likelihood of reoffense greater than 50 percent.

Although psychologist Dr. Charlene Steen disagreed with Dr. Donaldson on the question whether appellant suffered from pedophilia—like the prosecution experts, she diagnosed appellant as a pedophile—she agreed with him that appellant was not likely to reoffend upon his release. Dr. Steen opined that predictions based on the statistical tests, such as STATIC-99, were more accurate than clinical predictions based on individualized factors, which she considered "worse than chance." For Dr. Steen, the most significant factor in weighing appellant's likelihood of reoffending was his relatively advanced age. Her opinion was also influenced by her belief that appellant did not blame his victims; that he had no difficulties with intimacy with adult women; that he never used violence or

[9] Dr. Donaldson conceded that if in fact appellant had admitted to molesting his stepdaughter by his fifth wife after 1986, that could change his opinion about the likelihood of appellant reoffending.

the threat of force against any of his victims; and that there was no reason to believe he could not maintain regular employment, even as a 60-year-old paroled sex offender.

Like Dr. Steen, defense psychologist Mary Jane Alambaugh agreed that although appellant was a pedophile, he did not meet the third criterion for SVP status, i.e., likelihood to reoffend. Dr. Alambaugh had performed approximately 100 SVP evaluations, of which about 38 percent were positive. Unlike the other two defense experts, her initial evaluation was performed in 1998 on behalf of the Department. She later performed a second evaluation in 2002, at the request of the defense. She based her evaluation primarily on the actuarial statistical tests, which indicated appellant had a very low likelihood of reoffending. Unlike Dr. Donaldson, Dr. Alambaugh noted that appellant had admitted he had ongoing pedophilic interests and urges up to the present, and he had to work actively to control those urges. She also acknowledged that if the standard for determining SVP status was simply "likely to offend" as opposed to "more likely than not," she would conclude that appellant was in fact likely to reoffend if not given appropriate treatment.

In addition to these three experts, appellant offered the testimony of several family members. His sister Karen L. testified that their parents divorced when appellant was eight. Appellant was away from his mother for only one year, and he had a good relationship with his mother. She testified that appellant had strength of character, as shown by his decision to quit drinking and smoking, which he had maintained successfully for many years.

Appellant's fifth wife, Sandra W., testified that she did not believe that appellant had molested her daughter P. Appellant had told Sandra that he had only thought about it, but had decided not to. P. herself testified that she had known appellant since the age of six. She considered him a good person, and they maintained a good relationship. P. could not remember appellant ever molesting her. On the other hand, she testified that she was not sure whether he had molested her or not, and could not see why he would have admitted to doing so if he had not.

Richard Miskella, the Catholic chaplain at Atascadero, testified that he taught a course on thinking skills, designed to train inmates not to engage in criminal thinking in various life situations. The course was approximately 50 hours long, and was given in sessions of two hours per week. It was not specific to sex offenders. Over a period of almost two years, appellant took Miskella's course two times.

At the conclusion of trial, the jury found appellant to be an SVP. The trial court committed him as an SVP to a two-year term in the custody of the Department. This appeal timely followed.

ADMISSION OF VICTIM TESTIMONY

Appellant's first contention is that the trial court erred prejudicially by denying his Evidence Code section 352 objection, and admitting testimony by the principal victim of appellant's predicate offenses about his molestation of her. The contention is without merit.

At trial on this SVP commitment petition, the prosecution had the burden of proving beyond a reasonable doubt that: (1) appellant had been convicted of at least two separate sexually violent offenses; (2) he has a "diagnosed mental disorder"; and (3) his mental disorder made him "a danger to the health and safety of others in that it is likely that he . . . will engage in sexually violent criminal behavior." (§ 6600, subd. (a)(1); *People v. Poe* (1999) 74 Cal.App.4th 826, 830.) Admission of relevant evidence from the victims of an alleged SVP regarding the details of predicate offenses is permitted in an SVP commitment proceeding, even if it comes in the form of hearsay statements made out of court rather than from direct testimony at trial. (Cf. *People v. Otto* (2001) 26 Cal.4th 200, 206-215.) Certainly, in this case the victim's testimony was highly relevant to the elements of SVP status which the prosecution was required to prove. The issue is whether the relevance and probative value of this testimony was outweighed by its prejudicial or cumulative effects on the trial under Evidence Code section 352.

The weighing process under Evidence Code section 352 depends upon the trial court's consideration of the unique facts and issues of each case, rather than upon the

mechanical application of automatic rules. (*People v. Stewart* (1985) 171 Cal.App.3d 59, 65; *People v. Yu* (1983) 143 Cal.App.3d 358, 377.) We will not overturn or disturb a trial court's exercise of its discretion to admit or exclude evidence under Evidence Code section 352 in the absence of manifest abuse, upon a showing that its decision was palpably arbitrary, capricious, or patently absurd, and resulted in injury sufficiently grave as to amount to a miscarriage of justice. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10; *People v. Brown* (1993) 17 Cal.App.4th 1389, 1396; *People v. Robbins* (1988) 45 Cal.3d 867, 880-881; *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1314-1315; *People v. Adams* (1980) 101 Cal.App.3d 791, 799; *People v. Cordova* (1979) 97 Cal.App.3d 665, 670.)

Although the testimony at issue certainly ran counter to appellant's position at trial, the trial court did not abuse its discretion in concluding that its probative value outweighed any countervailing prejudice. The record shows that appellant repeatedly disputed Cristina's version of the underlying facts in his interviews and discussions with the testifying psychologists. Indeed, one of the defense psychologists, Dr. Donaldson, specifically testified that he had "no reason to reject . . . out of hand" appellant's denials of using force against his molestation victims and stopping if they resisted, which denials seemed "pretty truthful" to him. Cristina's testimony about appellant's forcible acts of intercourse with her, and his threats to her and to her family if she should reveal what he was doing, was in direct conflict with his own statements to the psychologists and expert witnesses. Even with appellant's convictions on the record, his own attempts to minimize the seriousness of his offenses and the credibility given to his statements by at least one of his own expert witnesses clearly placed in issue the facts of his molestations, and their level of seriousness.

Cristina's testimony was probative for other reasons as well. All of the prosecution experts testified that the numerical results of the RRASOR and STATIC-99 actuarial evaluations could not be used in isolation to assess appellant's likelihood of reoffending, and that it was necessary to adjust the actuarial scores with assessments

based on individuated clinical factors. While undoubtedly highly relevant and probative as to the nature and extent of appellant's underlying pedophilic mental disorder and *prior* sexual misconduct, Cristina's testimony was also probative as to his capacity for self control or lack thereof, his honesty and truthfulness, his empathy and remorse regarding his victims, and his ability to take responsibility for his actions. All of these factors were appropriate for the trier of fact to consider in assessing appellant's predisposition to commit sexual offenses in the future. (*People v. Poe, supra,* 74 Cal.App.4th at pp. 830-832.) In order to consider this evidence, moreover, it was necessary for the jury to hear the testimony of the victim herself so that it could evaluate her credibility. By the same token, to the extent appellant's expert witnesses accepted his version of the facts, the credibility of Cristina's testimony was highly relevant and probative to the weight which the jury should give to the testimony of those experts.

In sum, we conclude that the trial court did not abuse its discretion in concluding that the high probative value of Cristina's testimony substantially outweighed any possibility that it would necessitate an undue consumption of time, mislead the jury, or create a substantial danger of undue prejudice to appellant. There was no error in its admission.

FAILURE TO INSTRUCT ON THE DEFINITION OF "LIKELY" TO REOFFEND

Next, appellant contends that the trial court erred by failing to give the jury an instruction defining the term "likely," as used in the statutory definition of SVP status found in section 6600, subdivision (a). In *People v. Roberge* (2003) 29 Cal.4th 979, the California Supreme Court held that "a person is 'likely [to] engage in sexually violent criminal behavior' if at trial the person is found to present a *substantial danger*, that is, a *serious and well-founded risk*, of committing such crimes if released from custody"; and because the meaning of the term "likely" "is neither plain nor unambiguous," the trial court has a sua sponte duty to instruct the jury on the technical meaning of the term for purposes of an SVP determination, even without a request by any party. (*People v. Roberge, supra,* 39 Cal.4th at pp. 988-989.) Respondent concedes that the trial court

should have given the jury a pinpoint instruction defining the term "likely," contending nevertheless that any error in failing to do so was harmless.[10]

In keeping with the general principles applicable to review of any claim of instructional error, we must consider the jury instructions as a whole, without judging the presence or absence of a given jury instruction in artificial isolation and out of the context of the entire trial record. (*People* v. *Haskett* (1990) 52 Cal.3d 210, 235; *People* v. *Nichols* (1967) 255 Cal.App.2d 217, 222-223.) When a claim is made that instructions are lacking or deficient, we must determine their meaning *as communicated to the jury*. (*People* v. *Benson* (1990) 52 Cal.3d 754, 801; *People* v. *Warren* (1988) 45 Cal.3d 471, 487.) As a general rule, a trial court's failure to give an instruction on an essential issue may be cured if the essential material is covered by other correct instructions properly given. (*People* v. *Noguera* (1992) 4 Cal.4th 599, 648; *People* v. *Honeycutt* (1946) 29 Cal.2d 52, 60-62; *People* v. *Rhodes* (1971) 21 Cal.App.3d 10, 21; 5 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Trial, §§ 663-667, pp. 952-960.)

In any event, we will not set aside a judgment on the basis of instructional error unless, after an examination of the entire record, we conclude the error has resulted in a miscarriage of justice. (Cal. Const., art. VI, § 13.) Even applying the more rigorous federal constitutional standard of review requiring us to determine whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained," (*Chapman v. California* (1967) 386 U.S. 18, 24; see *People v. Roberge, supra,* 29 Cal.4th at p. 989, and *People v. Flood* (1998) 18 Cal.4th 470, 492-494, 504), on the

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10 We note that *Roberge* was issued in February 2003, ten months *after* the trial in this case, and eight months after filing of the notice of appeal. Thus, the trial court could not have known that the Supreme Court would require an instruction on the definition of "likely" to reoffend at the time it gave the relevant jury instructions in this case. Nevertheless, respondent does not contest the retroactive effectiveness of the Supreme Court's decision and concedes that failure to give the subject pinpoint instruction was erroneous. "The principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student." (*United States v. Security Industrial Bank* (1982) 459 U.S. 70, 79.)

record in this case we conclude that any error on the trial court's part in failing to give the *Roberge* instruction was harmless beyond a reasonable doubt.

In this case, there is no dispute that the jury instructions actually given were correct, insofar as they went. Thus, the trial court quite properly instructed the jury using the 2002 revision of CALJIC No. 4.19. The only error was the trial court's failure to give an additional instruction defining " 'likely [to] engage in sexually violent criminal behavior' " in the way outlined by the Supreme Court in *Roberge*, that is, as equivalent to presenting a substantial danger, or a serious and well-founded risk, of committing such offenses if released from custody. (*People v. Roberge, supra,* 29 Cal.4th at p. 988.) A close examination of the instruction actually given by the trial court in this case shows that it imparted essentially the same information as that contained in the Supreme Court's *Roberge* definition.

Thus, in addition to informing the jury that to find appellant an SVP it had to find it "likely" that he would engage in sexually violent predatory criminal behavior, the trial court instructed that the jury also had to find appellant had a "diagnosed mental disorder" that: (a) so "*predisposes*" him to committing criminal sexual acts that he constitutes "*a menace* to the health and safety of others"; and (b) "impair[s]" his "emotional or volitional capacity *to such a degree*" that he "has *serious difficulty in controlling* his sexually violent predatory criminal behavior." (Italics added.) In addition, the trial court repeatedly instructed the jury that if, after considering all the evidence, it had "a reasonable doubt" appellant met all the essential requirements for a finding of SVP status, it was required to find that he was *not* an SVP, and that the allegations of the petition were untrue.

In our opinion, these instructions render it highly improbable that any juror would have interpreted the term "likely" to mean merely "possible." To the contrary, the instructional use of strong words and phrases such as "predispose[d]" to the "commission of criminal sexual acts," "menace to the health and safety of others," "impair[ed] . . . emotional or volitional capacity," and "serious difficulty . . . controlling

. . . behavior," plainly do not suggest a merely negligible degree of possibility, but rather a grave risk amounting to a substantial, serious and well-founded degree of likelihood. (Cf. *People v. Roberge, supra,* 29 Cal.4th at pp. 985-989; *People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 916-917, 922.) Based on these instructions, we conclude that it is not reasonably plausible any jury would consider the mere possibility appellant *might* reoffend would be sufficient under the SVP law.[11]

Moreover, all the psychological experts in this case—whether for the prosecution or the defense—who expressed any opinion about the degree of likelihood necessary to make an SVP finding uniformly stated that it would require a greater than 50 percent chance of reoffense, or that the chances of his reoffending would be "more likely than not." Thus, the professional opinions offered at trial *by both sides* on the level of risk that appellant would reoffend *assumed* a definition of likelihood that was *even higher* than the "substantial danger" or "serious and well-founded risk" required by the Supreme Court in *Roberge*. (*People v. Roberge, supra,* 29 Cal.4th at pp. 986-989 [statute requires only that chance of reoffense be substantial, serious and well-founded, not that there be a more precise determination that it was better than even].)

At any rate, the entire record of this case demonstrated that the risk of appellant's reoffending was substantial as well as serious and well founded. The evidence showed that appellant had a difficult childhood, and began his own pattern of sexually molesting much younger children well before his own adolescence. Despite some gaps, his pattern of "grooming" and molesting prepubescent girls continued throughout his life. Even in his 40's appellant was engaged in serious acts of molestation, as shown by the facts of the

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11 As noted, the pertinent instruction given in this case was the 2002 revision of CALJIC No. 4.19. We take judicial notice of the fact that the Supreme Court granted the petition for review in *Roberge* on March 28, 2001, S094627, and the 2002 revision of CALJIC No. 4.19 necessarily came into effect *after* the date of the underlying trial on appeal in that case. According to the Supreme Court's opinion in *Roberge*, the trial court in that case simply gave an instruction defining an SVP "in accordance with the statute," i.e., section 6600, subdivision (a). Nothing in *Roberge* itself indicates that the instruction given by the trial court *in that case* imparted any of the additional information contained in the 2002 revision of CALJIC No. 4.19, as given by the trial court below in *this* case.

underlying criminal case. The nature, quantity and scope of his molestation of the principal victim, Cristina, was severe and even violent. Even after he was under suspicion for molesting Cristina, he continued to stalk, molest, and threaten her. Although appellant's age and successful efforts to overcome his own alcoholism were mitigating factors to be considered in evaluating his likelihood of reoffending, these factors were fatally undermined by the early onset of appellant's pedophilic urges and acts; his admitted compulsiveness and great difficulty in controlling his urges; his pattern of entering into relationships with women with daughters in his targeted group of six to nine; his practice of putting himself in high risk situations; his failure on parole; his ongoing acts of molestation past the age of 40 and admitted continuing urge to molest young girls up to the time of trial; his apparent lack of remorse for his victims and tendency to minimize his own responsibility; and his failure to complete any serious sexual offense treatment program.

Contrary to appellant's arguments on appeal, his low scores on the actuarial tests are not controlling. The record shows that these tests were simply designed to provide preliminary guidance. Their usefulness was limited in cases involving the relatively less violent "grooming" kind of molestations which appellant practiced. The prosecution experts all testified that appellant's low scores were misleading, and that these statistical instruments had to be supplemented by more individualized factors related to appellant's history. Although appellant's experts disagreed, the jury resolved the conflict by crediting the testimony of the prosecution's experts. As the courts have recognized, it is not our role to redetermine the credibility of experts or to reweigh the strength of their conclusions. (*People v. Poe, supra,* 74 Cal.App.4th at p. 831.) The testimony of Drs. Sheppard, Korpi and Longwell was substantial evidence sufficient to support the conclusion that appellant's low statistical scores on both the RRASOR and STATIC-99 scales could not be used in isolation, and had to be adjusted by the consideration of other individual factors. (*Id.* at pp. 831-832.)[12]

[12] We note that this question was recently discussed by Division One of this District in *People v. Poe, supra,* a case very similar to this on its facts. The court stated: "It is

Moreover, the testimony of appellant's own defense experts was itself in conflict. Defense psychologist Dr. Alambaugh *concurred* with the prosecution experts in her diagnosis of appellant as a pedophile suffering a mental disorder that impaired his emotional and volitional capacity, and predisposed him to commit criminal acts. She also concurred with them that any evaluation of likelihood to reoffend should consider the special features of individual cases, and that the usefulness and applicability of the STATIC-99 and RRASOR tests was limited by their failure to take such individualized factors into account. Dr. Alambaugh confirmed that appellant freely admitted both that his manner of molestation was to "groom" children, and that he continued to have pedophilic interests and urges toward children up to the time of trial. Even more significantly, Dr. Alambaugh specifically testified that, in her opinion, appellant still needed treatment to help him control these ongoing urges. Besides being highly damaging to appellant's case in and of itself, her testimony regarding appellant's continued pedophilic interests and urges toward children up to the time of trial fatally damaged the conflicting defense testimony of Dr. Donaldson, whose opinions were based at least in part on his stated belief that appellant had had no inappropriate sexual fantasies since 1993.[13]

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unnecessary to engage in a debate about what minimum percent risk using [the RRASOR] scale would support the conclusion that it is likely that person will reoffend, because *all* the experts who testified . . . agreed that the numerical results of this scale should not be used in isolation when assessing the likelihood of reoffending. Dr. Franks explained that the RRASOR evaluation 'doesn't consider a wealth of other information which has been shown to correlate with reoffense.' For example, it does not consider whether the offender has any insight into his past behavior, or whether he had any empathy for his victims, his coping mechanisms, his work skills, or his drug addiction. The experts agreed that the proper application of the RRASOR was an 'adjusted actuarial approach,' in which the RRASOR actuarial data, is used as a base, that is adjusted by assessing and weighing appropriate clinical factors. Using this approach, both [experts] concluded that the risk of appellant reoffending was *higher than 50 percent*." (*People v. Poe, supra,* 74 Cal.App.4th at p. 831.)

[13] Dr. Donaldson's expert opinion was also impaired by the fact he refused to subscribe to the diagnosis that appellant was a pedophile, a diagnosis which on the record in this

For all these reasons, appellant "cannot complain that the jury found him to be a sexually violent predator while concluding that his risk of reoffense if released from custody was less than 'substantial' or 'serious and well-founded,' " as required by *Roberge*. (*People v. Roberge, supra,* 29 Cal.4th at p. 989.) Beyond a reasonable doubt, appellant suffered no possible prejudice or miscarriage of justice from the trial court's failure to give a pinpoint instruction on the meaning of the term "likely."

SUFFICIENCY OF THE EVIDENCE TO SUPPORT THE VERDICT

Finally, appellant urges that there was insufficient evidence to support the jury's finding that he was an SVP. Appellant is wrong.

The critical inquiry is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 319.) An appellate court "must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.)

In this regard, the credibility and conclusions of the experts and other witnesses were matters to be resolved by the jury. We are not free to reweigh or reinterpret the evidence. The jury could reasonably believe the evidence of the prosecution witnesses and reject that of the defense witnesses. (*People v. Poe, supra,* 74 Cal.App.4th at pp. 830-831; *People v. Mercer* (1999) 70 Cal.App.4th 463, 466.) Based on our review of the entire record, it is clear that the jury's determination was supported by ample substantial evidence that appellant met the criteria for designation as an SVP.

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case cannot reasonably be in dispute. In so testifying, Dr. Donaldson disagreed not only with the prosecution experts but with both of the other two defense experts as well.

DISPOSITION

The judgment is affirmed.

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McGuiness, P.J.

We concur:

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Corrigan, J.

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Parrilli, J.